STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MARION KLEIN,

Plaintiff,

vs. Case No. 2005-4379-NO

BLUE CAROLLO, INC., a Michigan corporation, d/b/a FOUNTAINVIEW LANES,

Defendant.

_____/

OPINION AND ORDER

Defendant has brought a motion for summary disposition.

Plaintiff filed this complaint on November 1, 2005. Plaintiff alleges that she was bowling at defendant's bowling alley on November 7, 2004. Plaintiff claims that defendant negligently caused or permitted a "sticky" or "tacky" substance to accumulate on the approach to the lane in which she was bowling. Plaintiff alleges that she notified one of defendant's employees of the condition of the approach. Plaintiff claims that another of defendant's employees attempted to address the problem by spraying the lane with a substance designed to eliminate stickiness. After the employee had wiped down the area, plaintiff felt the approach with her foot, and noted that there still appeared be a residual "tackiness." When she brought this to the employee's attention, he allegedly informed her that it would "work itself out." Plaintiff then continued to bowl for approximately five frames, at which point she fell while traversing the approach. As a result of this fall, plaintiff claims that she suffered numerous injuries, including fractures to her

left hip and left wrist, leaving them permanently weakened. Plaintiff therefore commenced the present suit, sounding in negligence.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* The Court must resolve all reasonable inferences in the nonmoving party's favor. *Id.*

In support of its motion for summary disposition, defendant first asserts that plaintiff had actual knowledge of the alleged hazard prior to her fall, thereby relieving defendant of any duty to warn her or mitigate the condition. Alternatively, defendant suggests that there is no way of determining whether the sticky spot upon which plaintiff ultimately fell was the same sticky spot that plaintiff had noticed earlier, and which defendant's employee had attempted to remedy. Defendant claims this argument is supported by plaintiff's own acknowledgement that, following the cleaning of the approach, she continued to bowl for approximately five frames prior to her fall. Defendant thus avers that the initial sticky spot had been eliminated, while the condition which ultimately caused plaintiff's fall was an entirely new sticky spot of which defendant lacked either actual or constructive knowledge.

In response, plaintiff argues that even though she had knowledge of the dangerous condition at one time, defendant's employee's assurance that the condition would "work itself out" rendered the hazard no longer open and obvious. Further, plaintiff suggests that the fact that she was able to bowl for approximately five frames following the cleaning indicates that the residual stickiness was not open and obvious. Finally, plaintiff claims that whether the stickiness

which ultimately caused her fall was the same as that which defendant's employee had attempted to alleviate is a question of fact for the jury.

First, the Court shall determine whether the danger posed by the "tacky spot" was open and obvious as a matter of law. Landowners have a legal duty to exercise reasonable care to protect their invitees from dangerous conditions on their land. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992) (citations omitted). However, a landowner need not protect against an open and obvious dangerous condition unless the condition poses an unreasonable risk of harm. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious if an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

In the case at bar, plaintiff had actual knowledge that the approach was "tacky" or "sticky" *prior* to defendant's employee's attempt to correct the problem. See deposition of Marion Klein at 18. After defendant's employee had wiped the approach, plaintiff opined that the floor was "still a little tacky," to which defendant's employee responded that the condition "will work itself out." *Id.* at 34-35. Following this assurance, plaintiff continued to bowl for approximately five frames before she fell. During the hearing on this motion, plaintiff's attorney acknowledged that the sticky spot would have been open and obvious, were "it not for defendant's employee" indicating that he had "corrected the problem and even though . . . there's still a problem 'it'll work itself out.'"

Neither party has cited any binding authority indicating whether an individual can obfuscate an otherwise open and obvious danger by assuring an invitee that a formerly open and obvious condition has been or is being corrected, and the Court is aware of none. However, the

Court finds the unpublished opinion of *Horne v Strawberry Hills Corp*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2003 (Docket No. 2402247), to be persuasive. In *Horne*, plaintiff was making a delivery to a store and noticed that the loading dock was wet. He informed a store employee of this condition, and was told that the loading-dock ramp would be taken care of. Plaintiff subsequently noticed that sawdust had been spread over the ramp, and began to pull his dolly backwards up the ramp. He slipped and fell, due to the fact that the ramp was still wet underneath the sawdust. The Court of Appeals reasoned that "an average user of ordinary intelligence might believe that the ramp did not continue to present a danger where the slipperiness of the ramp appeared to have been corrected by defendants' employees after request." As such, the Court of Appeals reversed the trial court's decision to grant summary disposition to the defendant.

Upon carefully review of the documentary evidence presented, the Court finds that an average person of ordinary intelligence could have believed that the stickiness of the approach did not continue to present a danger once the stickiness appeared to have been corrected by defendant's employee, and where defendant's employee had assured plaintiff that the situation would "work itself out." Plaintiff's reliance on the employee's assurance seems particularly reasonable in light of defendant's own contention that the cleaning solution used on the approach alleviates the stickiness as it evaporates, rather than immediately upon contact.[1] Therefore, the Court is satisfied that a reasonable person may have taken defendant's employee at his word and continued to bowl. The Court cannot say, as a matter of law, that danger posed by the alleged "sticky spot" remained open and obvious after the corrective measures had been taken.

[1] Specifically, defendant notes that the approach is cleaned with "an alcohol based cleaner that is designed to break down any tacky substance on the approach as it evaporates. Accordingly, the alcohol based solvent must dry before it reaches maximum efficiency." Defendant's Brief in Support of Motion, at 4, n 3 (emphasis removed).

Having determined that the danger posed by the "sticky spot" was not open and obvious as a matter of law, the Court now turns to defendant's second argument. As noted above, defendant contends that it is not clear whether the sticky spot which allegedly contributed to plaintiff's fall developed before or after defendant's employee cleaned the approach. Defendant thus argues that it lacked either actual or constructive knowledge of the condition.

Whether the sticky spot on which plaintiff fell is the same sticky spot which she brought to the attention of defendant's employees is relevant insofar as defendant cannot be held liable for an injury resulting from a dangerous condition on the land where the defendant neither knew of the condition nor should have known about the condition. It is well established that a plaintiff cannot rest on mere speculation and conjecture in order to establish causation. *Badalamenti v Beaumont Hospital*, 237 Mich App 278, 285; 602 NW2d 854 (1999) (citation omitted). However, "[t]he availability of the inference that" a dangerous condition has existed for some time precludes summary disposition or a directed verdict based on a "lack of evidence about when the dangerous condition arose." See, e.g., *Clark v Kmart Corp*, 465 Mich 416, 421; 634 NW2d 347 (2001) (citations omitted).

Although plaintiff felt the sticky spot *immediately* after defendant's employee had cleaned it, neither she nor her teammates noticed any residual stickiness from the time they resumed their game until the time plaintiff fell. Klein Deposition, *supra* at 72-73. Plaintiff testified that she "didn't hit [the sticky spot] until the ninth frame again." *Id.* at 72. This testimony suggests that plaintiff's foot stuck on the *same* sticky spot which defendant's employee had attempted to alleviate. To the extent that plaintiff's testimony in this regard is credited by the jury, the jury could reasonably infer that defendant's employee's attempt to clean the approach was unsuccessful, and the stickiness had not actually "worked itself out." To the

extent that defendant's employees failed to correct the dangerous condition which was brought to their attention, actual knowledge of the condition may be attributed to defendant. As such, summary disposition based on a lack of knowledge is inappropriate at this time.

For the reasons set forth above, defendant's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: JUN 30 2006

cc: Carl F. Gerds, III, Attorney at Law

Michael C. O'Malley, Attorney at Law